FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 129.

GENERAL AMERICAN TANK CAR CORPORATION
(a corporation),
Petitioner,

v.

EL DORADO TERMINAL COMPANY
(a corporation),
Respondent.

BRIEF FOR RESPONDENT IN ANSWER TO BRIEF OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE.

W. F. WILLIAMSON,
W. R. WALLACE, JR.,
RICHARD P. NORTON,
WILLIAMSON & WALLACE,
310 Sansome Street,
San Francisco, California,
Attorneys for Respondent.

INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 129

GENERAL AMERICAN TANK CAR CORPORATION
(a corporation),
Petitioner,

vs.

EL DORADO TERMINAL COMPANY
(a corporation),
Respondent.

BRIEF FOR RESPONDENT IN ANSWER TO BRIEF OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE.

I.

Answer to the Argument that the District Court Was Without Jurisdiction.

The argument of *amicus curiae* that the District Court lacked jurisdiction to entertain the suit is based upon the claim that the controversy presented a question essentially administrative in character within the exclusive jurisdiction of the Interstate Commerce Commission, and that such

question had no prior determination on the part of the Commission. In advancing this argument counsel for the Commission have overlooked the fact that the action is between two manufacturing corporations, neither of which is a carrier or engaged in transportation. The El Dorado Company sued *in assumpsit* in the State Court of California to recover money claimed to be due from the General American Tank Car Corporation. On the petition of the car corporation the action was removed to the District Court, Northern District of California, Southern Division, on the ground of diverse citizenship. The State Court had jurisdiction and under the Judicial Code, the District Court had jurisdiction upon the removal. In its answer to the complaint the car corporation pleaded that payment of the amount claimed by the El Dorado Company in accordance with the written agreement between the parties was expressly prohibited and enjoined by the provisions of the Elkins Act and that payment by the car corporation in accordance with its agreement with the El Dorado Company in excess of the car rental agreed to be paid by the El Dorado Company to the car corporation for the use of tank cars would give to the El Dorado Company a rebate concession or discrimination in violation of the provisions of the Elkins Act. It is apparent, therefore, that the action did not in its inception involve any question but the liability of the car corporation under the terms of its contract with the El Dorado Company. Of that question both the State Court and the District Court after removal had jurisdiction. The answer of the car corporation raised the question as to the effect of certain provisions of the Elkins Act upon the obligations of the car corporation under its contract with the El Dorado Company. This was primarily a question of law. It did not involve a rule or order of the Interstate Commerce Commission, or the fixing of rates or other administrative question within the jurisdiction of the Interstate Commerce Commission; nor was there involved any claim whatsoever against a railroad or

anyone engaged in interstate transportation. The car corporation did not plead invalidity of its agreement. In fact, it pleaded the agreement as a lawful commercial contract and attached a copy to its answer.

While counsel for the Commission are correct in stating that the question of jurisdiction is open for consideration in this Court, although it was not raised in the lower courts, it is settled by the decisions of this Court that the question of jurisdiction depends upon the status at the time the action is brought and jurisdiction once vested cannot be ousted by subsequent events. In the case of *Mollan et al.* v. *Torrance*, 9 Wheat. 537, Chief Justice Marshall announced the rule in the following language: "It is quite clear that the jurisdiction of the Court depends upon the state of things at the time the action brought, and that after vesting it cannot be ousted by subsequent events."

Our research does not disclose that this rule has ever been departed from. On the other hand, it was expressly reaffirmed by Mr. Justice Brandeis speaking for the Court in *Minneapolis and St. Louis Railroad Company* v. *Peoria and Pike Co.*, 270 U. S. 580. In applying the rule in *Northwestern Bell Telephone Company* v. *Hilton, as Attorney General*, 274 Fed. 384, the Court said at page 390: "On the face of the complaint the cause of action within the jurisdiction of this Court is plainly stated, and the jurisdiction of the Federal Court is to be determined on the statement by the plaintiff himself in his complaint. I think that proposition is too well established to require the citation of any authorities or further discussion of the proposition." It does not appear nor is it claimed by counsel for the Commission that the original complaint was framed to conceal a question within the administrative authority of the Interstate Commerce Commission or to avoid the jurisdiction of the Commission. Inasmuch, therefore, as the District Court had jurisdiction of the controversy under the Judicial Code that Court could not have properly dismissed the action either on motion or, as suggested by *amicus curiae*,

sua sponte. However, counsel for the Interstate Commerce Commission have, we think, with a mistaken view of the case, argued this question at some length. We shall therefore answer their argument more in detail.

The first point urged by *amicus curiae* is that the El Dorado Company as a lessee of tank cars furnished such cars to the carriers for the transportation of the oil company's coconut oil but that the carriers' tariffs did not provide for an allowance to the shipper for the use of the cars. It is true that the rules covering mileage allowances for the furnishing of tank cars as set out in the published tariffs of the railroads did not in direct terms provide for payment of such mileage to the shipper. Nor did they exclude the shipper. In effect though not in words, those provisions contemplated that payment of the mileage allowance could be made to the shipper. This is shown by the excerpts from the tariffs which are set out at pages 192-201 of the Record. The carriers in those rules undertook to pay for the furnishing of tank cars at 1½¢ per mile "to the owner or the party who has acquired" * * * the car or cars provided the cars are properly equipped and marked with reporting marks. The essential feature of this rule is that the carriers agree to pay the mileage for the furnishing of the cars either to the owner or to the party who having temporary title or use supplies the cars. Of necessity, this must include the shipper who could not use the car for the shipment of its property without being in the class of "a party who has acquired the car." That the tariffs were so understood by the Commission as well as the carriers is shown by the statements of the Commission which are quoted in the brief of *amicus curiae*. In fact, counsel for the Commission in their brief expressly concede that the El Dorado Company as the lessee and shipper of the tank cars would be entitled under the tariffs eceive, and could lawfully collect, the mileage allowances if it had caused its name to be stenciled upon the cars and so reported. *Amicus curiae* also admit that the reservation in the tariffs for payments ac-

cording to reporting marks was intended only for the protection and convenience of the carriers. There can be no question of the right of a shipper to claim compensation in the form of allowance by the carrier for the furnishing of tank cars or other instrumentality used by the carrier in transportation. It is so provided in Section 15 (13) of the Interstate Commerce Act quoted at page 11 of the brief of *amicus curiae*. Counsel for the Commission also urge that under the tariffs mileage allowance was not payable to the car corporation as the owner of the cars because the shipper alone furnished the cars to the carriers. This contention does not follow from the reading of the tariff rules which provide *inter alia* for the payment of the mileage to the car owner notwithstanding the signing and reporting of marks in the name of the shipper. Neither the El Dorado Company as plaintiff nor the car corporation as defendant in the District Court sought any recovery from the railroad carriers or made any claims as against them. As between parties litigant and the carriers the rules of the published tariffs were accepted without question. And, since there was no issue as to the fairness of the tariffs or as to the reasonableness of the mileage allowance provided in the rule to be paid, there was no administrative question for the Commission to determine and the cases cited by counsel for the Commission are without point. We will concede that if there were question as to the fairness of the tariff provision, or the reasonableness of the allowance therein made for the furnishing of cars, or if a shipper or car owner were claiming compensation from the carrier for the furnishing of cars or other instrumentalities contrary to or in excess of that provided in the published tariffs, the question would be one of administration or rate fixing and within the primary jurisdiction of the Interstate Commerce Commission. But no such question is presented in this case. The only issue is between the El Dorado Company as the lessee of the tank cars and the car corporation as the lessor of the cars. The car corporation denied liability under its con-

tract solely upon the ground as pleaded that performance of its admitted obligations was prohibited by the provisions of the Elkins Act. It did not question the effectiveness or reasonableness of the tariff rules nor did it deny the receipt by it thereunder of the stipulated mileage allowance. The question of liability was a purely legal question within the jurisdiction of the courts and not for the primary determination by the Interstate Commerce Commission. *Amicus curiae* do not claim for the Interstate Commerce Commission jurisdiction to hear or determine the rights or obligations under contracts in no manner connected with transportation by carriers. In fact, under the ruling of this Court in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, the Commission has no jurisdiction over the dealings of car-owning companies that are not carriers or shippers. The Commission itself has recognized the limitations upon its authority in its order of April 27, 1939, in the proceeding entitled "Investigation and Suspension Docket No. 4572, Refrigerator Car Mileage Allowances" wherein it was held that the Commission is without jurisdiction to determine the reasonableness of the compensation to be made by the carriers themselves to car-owning companies. If a car-owning company is not accountable to the administrative control of the Commission in respect of contracts with the railroad carriers, it obviously is not subject to such control by the Commission in respect of its contracts with those who are not carriers. Otherwise, the Commission would have authority to control the price at which car companies manufacture and sell their cars.

It would seem entirely clear, therefore, that the claim advanced by *amicus curiae* that the District Court was without jurisdiction fails, not only because the District Court had jurisdiction but because the Interstate Commerce Commission did not under the facts of the case have any administrative authority or jurisdiction.

It is next urged by counsel for the Commission that where a shipper furnishes services or instrumentalities to a car-

rier for which the published tariffs do not provide compensation, the shipper must institute proceedings before the Interstate Commerce Commission for recovery of a reasonable allowance. We do not question the rulings of the Commission and the decision of the courts that since the Act requires the filing and publication of all tariff rates and allowances no allowance may be legally paid that is not provided for in the filed and published tariffs. The Commission has also upon occasion fixed the allowance to be paid for switching and for car services but this is referable to the authority conferred upon the Commission by the Interstate Commerce Act to investigate the reasonableness and fairness of all tariffs and rules of the railroad carriers and either upon complaint or on its own initiative to modify, suspend, or cancel such tariffs. But this jurisdiction, which *amicus curiae* speak of as "a primary jurisdiction in all controversies involving administrative questions" does not extend to the relation between non-carrier manufacturing corporations under a contract in no manner connected with transportation and where no carrier was in any way involved. The Commission's only concern with privately-owned cars results from their use in transportation and as said by this Court, in *Ellis* v. *Interstate Commerce Commission, supra,* "Control of the Interstate Commerce Commission over private cars is to be effected by its control over the railroads that are subject to the Act." Inasmuch as respondent El Dorado Company is not seeking recovery or making any claim against the railroad carriers for any allowance, application to the Interstate Commerce Commission for an order enlarging or changing the published tariffs so as to specifically provide for such payment would not only be futile but wholly unwarranted. The fact that such an application might be made, as suggested by *amicus curiae,* in a proper case, does not establish the authority, administrative or judicial, of the Interstate Commerce Commission in this case; or warrant the claim that the District Court was in any manner divested of its civil jurisdiction.

Pursuing the same thought, counsel for the Commission argue that the Commission has made no determination as to what would be a reasonable allowance to the shipper under circumstances shown by the Record in this case. As before stated that question is not present. The shipper is not asking any compensation or allowance from the carrier. It is an admitted fact that the carriers are paying only one mileage allowance for the furnishing of the cars which amount is that provided in the published tariffs. Neither party to the action is seeking any compensation from the carriers. Nobody, not even the Commission, has challenged the reasonableness of the tariff mileage allowance. If as *amicus curiae* claim, the Commission has made no determination as to the mileage allowance of 1½ cents, it is nevertheless true that the Commission had under the Act complete authority either on complaint or on its own initiative to investigate the reasonableness of such mileage allowance and suspend, modify or cancel the same. In its report *In the Matter of Private Cars*, 50 I. C. C. 652, the Commission expressly approved the practice of paying such mileage to the furnisher of tank cars, whether owner or shipper, and as counsel for the Commission state the 1 cent mileage previously approved was increased to 1½ cents by the action of the carriers in 1926 and was then incorporated in the filed and published tariffs and has been effective ever since. It accordingly had the force and effect of a statute and was binding, (*Pennsylvania Railroad Company* v. *International Coal Co.*, 230 U. S. 184), whether or not the Commission had made any official determination as to the reasonableness of the allowance. The fact that over the intervening 13 years the Commission with ample authority to make such investigation failed to do so, is persuasive evidence of its acceptance of that rate of allowance as just and reasonable.

Amicus curiae next make the point that because, as they argue, the mileage allowance was not payable to the El Dorado Company as a shipper, it does not represent a reason-

able allowance to the shipper for the reason that the payments sought by the El Dorado Company from the car corporation were condemned by the Commission in the proceeding entitled "Use of Privately Owned Refrigerator Cars", 201 I. C. C. 323. As herein above pointed out payments by the carriers to the El Dorado Company as shipper are not involved in this case. None has been made and none is claimed. It is therefore wholly unimportant whether such payments would be reasonable or unreasonable. The rate of such mileage and the practice of paying it to a shipper was, we believe, approved by the above cited reports of the Commission. In their brief *amicus curiae* claimed otherwise, but urge that this is immaterial in view of the expression of the Commission in *Use of Privately Owned Refrigerator Cars; supra.* If counsel are correct in this last assertion they are in error in claiming that the Commission has made no determination of the question of the reasonableness of the mileage allowance. The report of the Commission in the *Refrigerator Car case* is in the Record. The payments "condemned" as counsel say were those that the carriers could pay to shippers under the terms of the published tariffs (R. 150-158). Others were not involved or even considered and no mention was made in the condemnation of payments by a car owner to the car lessee under the terms of a contract of lease. Furthermore, the Refrigerator Car proceeding did not involve mileage payments for the use of tank cars which as the Commission there states the carriers could not furnish and the findings and the order of the Commission made thereon were expressly limited to refrigerator cars. As to tank cars the Commission held that the evidence was not comprehensive enough to warrant a conclusion (R. 139). Accordingly, the report of the Commission specifically referring to tank cars *In the Matter of Private Cars*, 50 I. C. C. 652, *supra*, represented together with its acceptance over a period of 13 years of the mileage increase made by the carriers must be held to be the Commission's determination that such al-

lowances are just and reasonable. The propriety of payment to the shipper was definitely recognized by the Commission and the validity of such payments to a lessee as distinguished from an owner was recognized by this Court in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, (a case cited by *amicus curiae*) where this Court held that under the Act there is nothing to prevent the claimant hiring instead of owning the instrumentality by him furnished to the carriers.

The whole argument of *amicus curiae* on the question of jurisdiction of the District Court as summarized at page 11 of their brief reduces down to the point that because the Commission would have the primary right of determination of a claim, which was not asserted in this case against railroad carriers for tank cars furnished by a shipper-lessee, the District Court must lose jurisdiction already vested and to which it was entitled under the Judicial Code of an action for money alleged to be due under a contract in which the carriers have no interest and which of itself had nothing to do with transportation. We believe the contentions of *amicus curiae* are readily answered by the decision of Chief Justice Marshall in *Mollan* v. *Torrance*, *supra*, and also by the fact, which the Record discloses, that this action does not involve a question within the administrative authority of the Commission or over which the Commission has any jurisdiction.

II.

Answer to the Argument that Payment by Private Car Line to a Shipper of Any Part of the Mileage Allowances Received from the Carrier in Excess of the Rental Such Shippers Paid to the Car Line, Etc., Results in Such Shipper Obtaining Transportation at Less than the Established Tariff Rate.

This was in substance the claim of the Petitioner in the lower courts. It was definitely rejected by the Circuit Court of Appeals and the Petitioner was adjudged liable for the amounts due to be paid by it as provided in its contract for car lease with the Respondent. It is clear that to sustain such a defense the stipulated payment must be prohibited by the letter of the Act or contrary to, and therefore not authorized by, the published tariffs of the railroad carriers. The contention which was urged by Petitioner in its defense in the District Court and again in the Circuit Court of Appeals that payment by the Car Corporation of mileage earned by the tank cars in excess of the car rental paid by Respondent for such cars is expressly prohibited by the provisions of the Elkins Act is answered by the Act itself, which contains no such prohibition and makes no reference whatever to car mileage allowances or car costs. The car mileage allowance schedules, which are a part of the published tariffs and are shown in the Record on pages 190 to 201, likewise contain no reference to car rentals as between car owner and the shipper, or to the disposition of moneys after payment thereof by carriers for the furnishing of cars or other instrumentalities. The tariffs, therefore, do not prohibit payment by the car owner, Petitioner here, of the mileage received in accordance with its agreement and, as held by the Circuit Court, the defenses set up by the Car Corporation failed.

Counsel for the Interstate Commerce Commission, in discussing the merits of the case, approach the question from a somewhat different angle. Their first point is that the

carriers have a primary duty to furnish cars for transportation purposes. We do not dispute this, but we do claim, and our position in that is supported apparently by *amicus curiae*, that where the carriers permit shippers to furnish cars or other instrumentalities for transportation purposes, the shipper is entitled to demand and receive from the carriers just and reasonable compensation for the services or facilities so furnished. This is expressly authorized by the Interstate Commerce Act, Par. 15 (13) and also by the findings and order of the Interstate Commerce Commission following its investigation in 1918 *In the matter of Private Cars*, 50 I. C. C. 652. The Commission there expressly determined, after a very full investigation, that the practice, then twenty years old, whereby shippers leased or rented cars and furnished them to interstate carriers for transportation purposes, receiving an allowance computed on the basis of mileage hauled, loaded and empty, should be continued. The mileage rate then in effect was ordered increased and thereafter, in 1926, it was increased to the present mileage rate of 1½¢ per mile. The Commission made no order, rule or regulation denying shippers the privilege of furnishing tank cars and, upon compliance with the rules as to car markings, receiving the mileage allowance provided to be paid according to the tariffs.

The Commission in its findings and order *In the Matter of Private Cars* recognized and made mention of the fact that uniform rates, which are essential, would of necessity result in some shippers enjoying benefits and profits. Notwithstanding that the carriers were directed to continue the payment of mileage allowances to the shippers furnishing cars. But counsel for the Interstate Commerce Commission apparently claim that although under the Act and the railroad tariffs the carriers may pay the mileage allowances to the car owner furnishing cars or to a shipper so furnishing them if the appropriate reporting marks are stenciled on the cars, yet the car owner may not pay to its lessee, the shipper, any part of the car mileage so received

in excess of the car rental. Since the car-owning companies, like the Petitioner in the instant case, are not engaged in transportation, their charges for the rental of cars furnished to shippers are not a part of the published tariffs but are arrived at by private negotiation. There does not seem to be a sound reason for upholding the payment by a car owner of the mileage received from a carrier for the furnishing of tank cars up to the amount of the rental paid by the lessee for such cars, but denying the legality of any payment in excess of such car rental. In either case the shipper may have an advantage over other shippers. If he had paid a high rental he would get a larger refund of mileage earned from the car owner than would his neighbor who had paid a smaller car rental. Such a construction of the law and of the relations between carriers, car owners and shippers would result in there being as many car mileage rates as there were car owners and shippers, and the carriers would be called upon in the case of every private car furnished by a lessee to determine the cost of that individual car to the shipper so furnishing it and to limit mileage payments accordingly.

The Interstate Commerce Act and the Elkins Act amendatory thereof aimed to prohibit rebates, discriminations or concessions on the part of a carrier, or anyone acting in its behalf, whereby a shipper would secure transportation of his products at less than the freight rate fixed in the filed and published tariffs of the railroad carriers, but it was not the purpose of the Act, as was said by Mr. Justice Holmes in speaking for this Court in a case involving rates for supplying grain elevator facilities, to attempt "to equalize fortune, opportunities or abilities" (*Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46). The Commission evidently had the same thought in mind in making its orders *In the matter of Private Cars, supra.*

Counsel for the Commission rest their argument that payments by a car owner to a shipper of mileage allowances should be limited to the car rental paid, almost entirely

upon the findings of the Commission in the proceeding entitled *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323. On the authority of excerpted passages from those findings, counsel for the Commission apparently contend that an agreement is unlawful under which a car owner leases cars to a shipper upon the understanding that the car owner would collect the mileage allowances provided in the published tariffs for the credit of the shipper. This is outside the issue tendered by the Car Corporation in the District Court, and is also contrary to the claims of the Car Corporation in the Circuit Court of Appeals and in this Court.

It is not claimed that the Commission held such agreements to be unlawful, but rather that the payment of mileage so received in excess of the car rental for the use of refrigerator cars was condemned in that proceeding by the Commission and therefore the car lease contract between two non-carriers covering tank cars should be held unlawful by this Court, thereby enabling the Car Corporation to retain to itself a large part of the mileage allowance earned by the cars held under lease by the Oil Company. The carriers would gain nothing because they would pay the same mileage. The same freight rates would be paid, as they have been in the past, to the full extent of the published tariffs. The Oil Company would pay the same monthly rental for the cars as provided in its lease, but would not receive the mileage allowance as stipulated in said lease. The Car Corporation, on the other hand, would retain all of the mileage allowance notwithstanding it had received in advance its stipulated monthly car rentals from its lessee.

Counsel for the Commission quote at length from the findings in the *Refrigerator Car Case* to show that under leasing arrangements covering refrigerator cars substantial profits might be realized by shippers at the expense of the interstate carriers. Special mention is made of the fact that other shippers obtaining cars from the same or other

car lines might be less fortunate in not obtaining as favorable terms, etc.

In the closing paragraph of its findings and as its conclusion from the evidence the Commission said, "We do not undertake to say that a carrier may not accept private cars, if it so desires, but if such cars are accepted the carriers may not acquiesce in arrangements under which mileage earnings accruing to the car owner are paid in whole or in part by such car owner to the shipper-lessee, which results in the payment by such shipper of charges less than the published tariff rate."

This conclusion is not applicable to the present case. The Commission was there dealing with the mileage for cars rented by the carriers from the car owners and the payment to the shipper of any part of the car mileage would in effect be a refund in part of freight earned by the facility acquired and used by the carrier. As shown by the findings of the Commission in that proceeding also the railroad carriers were stocked with refrigerator cars sufficient to meet the demands of shippers. When, therefore, a shipper used a privately owned refrigerator car, he to that extent reduced the potential earnings of the carrier whose refrigerator car remained idle. To the extent that the shipper could acquire for his uses a privately owned refrigerator car at less cost to himself than he could obtain a corresponding car from the railroad carriers he secured a benefit in the nature of a prohibited discrimination. No such result was claimed or was possible in the present case. It was shown without conflict and in fact stipulated (R. 201), that the Transcontinental Freight Bureau's tariff covering freight rates for shipments in tank cars provided that the carriers did not obligate themselves to furnish tank cars. The reason for this is further explained by the testimony of the representatives of all western railroads operating out of the San Francisco Bay area. They testified that their several companies did not have the cars, either in the quantity or with the equipment re-

quired; to meet the demands of the El Dorado Oil Company for the transportation of its coconut oil, or the demands of other vegetable oil producers. They did not hold themselves out to furnish the cars for the reason that they did not have them and could not furnish them (R. 165-170).

Furthermore, the Commission in *The Use of Privately Owned Refrigerator Cars*, after referring to the fact that the carriers do not hold themselves out to furnish tank cars to shippers and do not own or lease sufficient tank cars to enable them to do so, etc., said of the evidence before it in respect of the use of tank cars and mileage earnings thereon, etc., "That is not comprehensive enough to warrant a conclusion as to whether abuses such as we have discussed in connection with private refrigerator cars attend the use of private tank cars."

If the evidence was not sufficient to warrant a decision, it would be natural that the decision would be limited in so far as tank cars are concerned. In that behalf the Commission, in the closing pages of its report on *The Use of Privately Owned Refrigerator Cars* made the following observation:

> "The discussion herein has been confined almost entirely to refrigerator cars and the findings will be so restricted but the general principles enunciated apply equally to all other types of cars."

The resulting order dismissed the proceedings as to all cars other than refrigerator cars and ordered the carriers to cancel certain schedules under suspension in respect to mileage allowances on refrigerator cars. Therefore, the findings and the order of the Commission were restricted to refrigerator cars and were given no effect whatever as to tank cars or the disposition of mileage allowances for the use of them. Quite properly the Circuit Court treated the remarks of the Commission in so far as they referred to tank cars as being *dicta* only.

The Commission has no real interest in the outcome of this case and the brief submitted in its behalf is directed

chiefly to apply the general principles announced by the Commission in its consideration of *The Use of Privately Owned Refrigerator Cars* to the wholly different state of facts disclosed by the record in the instant case. Respondent's position is that this case is confined within the issues as presented in the lower courts and that the Interstate Commerce Commission may not by appearance in this Court change those issues or present a case different from that before the lower court as disclosed by the record. In the District Court the Car Corporation admitted the execution of the agreement and its liability thereunder, but justified its refusal to perform on the ground that payment of the mileage allowances received by it under the published tariffs was expressly prohibited and enjoined by the Elkins Act. If, as held by the Circuit Court of Appeals, neither the Elkins Act nor the published railroad tariffs prohibit the Car Corporation from paying to Respondent the car mileage allowances so received, the Commission may nevertheless investigate the effect of such payments, looking beyond the form of the agreement, as *amicus curiae* say, and make such order as may be considered proper. Any such order would be binding upon the carriers because they are at all times within the administrative control of the Commission. In such an investigation the Commission could determine to what extent, if at all, it may control the dealings between a car owner (not engaged in transportation) and a car user; also whether the allowances paid by carriers for cars furnished to them must be determined on the basis of the car rental cost to the shipper or on a uniform basis provided in the tariffs, as held by the Commission *In the Matter of Private Cars, supra*. The authority for such investigation by the Commission is given by statute and would be open to the Commission regardless of the outcome of this case. Counsel for the Commission correctly state that the Circuit Court of Appeals did not pass upon those questions, but neither the District Court nor the Circuit Court was required or permitted under the issues to

pass upon those questions and we submit that this Court may not properly do so upon the record before it. Counsel for the Commission claim that those questions are administrative in character and call for primary determination by the Commission. On that premise, the lower courts quite properly did not pass upon them and there was no error on the part of the Circuit Court of Appeals in failing so to do.

The Circuit Court of Appeals referred to the report of the Commission *In the Matter of Private Cars, supra,* as a determination that shippers as well as owners of tank cars could supply them to the railroads and receive compensation in the way of mileage allowance therefor in conformity with the published tariffs and that these orders were made in the face of the apparent knowledge on the part of the Commission that such practice then in general use would on occasion result in inequalities between shippers and possible abuses.

Counsel for the Commission take exception to certain comments of the Circuit Court, but the review by *amicus curiae* of that report agrees in substance with the views of the Circuit Court of Appeals and passages quoted in the brief for the Commission fully sustain the views of the Circuit Court.

Counsel for the Commission argue that the findings of the Commission *In the Use of Privately Owned Refrigerator Cars* is not inconsistent with the action of the Commission *In the Matter of Private Cars,* and complain that the Circuit Court "seem to give full consideration to the earlier report and overlook the salutary principle established in the second report."

If, as claimed, there was no inconsistency in the reports, such action on the part of the Court would be obviously of no effect, but to justify the Commission's appearance in this case and its attempt to broaden the inquiry to include issues not before the Court, Counsel are forced to take the position, which in effect they have taken in their brief, that

the action of the Commission *In the Use of Privately Owned Refrigerator Cars* has a bearing on this case. This, of course, disposes of the claim advanced in the first section of the brief of *amicus curiae* that the Commission has made no determination of the right of a shipper-lessee to receive through car owners mileage allowances earned on the leased cars. But if, as counsel for the Commission claim, the observations of the Commission *In the Use of Privately Owned Refrigerator Cars* is to be accepted as a declaratory action of the Commission, they must nevertheless be circumscribed in their authoritative effect by the limitations which were expressly placed thereon by the Commission. Not only was the order of the Commission limited to refrigerator cars and the proceeding as to all of the cars dismissed, but the Commission itself limited its findings to refrigerator cars and as to tank cars held that the evidence was not comprehensive enough to warrant any conclusion on the part of the Commission.

The Commission is authorized by the Act to investigate such matters whether on complaint or on its own initiative and thereafter to make orders or rules. Its action is reflected by such orders or rules and not by informal observations or comments. Counsel for the Commission have endeavored in the brief to give to such comments, notwithstanding the limitation placed thereon by the Commission, the force of a formal order by the Commission. We submit that the formal order of the Commission, based upon its full investigation *In the Matter of Private Cars,* represented a considered judgment of the Commission and is effective both in its permissive and directory provisions until modified by formal action of the Commission after investigation, or until changed by statute. The statements of the Commission, in its review of the evidence before it *In the Use of Privately Owned Refrigerator Cars,* especially when limited as above stated by the action of the Commission to refrigerator cars, did not destroy the effect

of the Commission's action *In the Matter of Private Cars* and the Circuit Court of Appeals properly so held.

But however considered, the observations of the Commission quoted or referred to in the brief filed by *amicus curiae* are entitled to no weight in this case where the question of the reasonableness of the car rental as fixed by the parties in the car lease agreement was not an issue. Both parties stand upon the agreement as written. Counsel for the Commission have endeavored to fit the findings of the Commission *In the Use of Privately Owned Refrigerator Cars* to the present case, and in doing so have indulged in various assumptions as to the facts and have drawn inferences therefrom which have no support in the evidence. Primarily it was agreed in the Trial Court that on every movement of the tank cars in question the carriers received the full freight provided to be paid in the applicable tariffs. Therefore, the finding which is quoted at page 25 of the brief filed by *amicus curiae* is inapplicable because the criticism there made was based upon the premise that the shipper transported his property at less than the published tariff rates.

The statements of the Commission *In the Use of Privately Owned Refrigerator Cars* that certain practices therein mentioned would result in profits to the shipper-lessee are likewise without application here. The brief for *amicus curiae* admits that there was no evidence in the present case as to the cost of the cars to the El Dorado Company. The Car Corporation submitted no evidence in the District Court as to the cost to the Respondent of the tank cars by it furnished for the transportation of its coconut oil. The Car Corporation offered no such defense. The Oil Company stood upon the agreement and since the Car Corporation's only defense was that payment by it as provided in the lease was expressly prohibited by the Elkins Act the Oil Company was not called upon to prove the cost of the cars or the expense to which it was put to supply them. The Circuit Court properly held that if the Car Cor-

poration desired to defend upon the ground that the agreement was unlawful or that performance on its part was excused because the payments agreed to be made were in excess of the car cost to Respondent, the Car Corporation should have tendered the issue and proved the facts.

In the circumstances, we think no good purpose would be served by specific reference to the various statements in the brief of *amicus curiae* of the general tenor that under the terms of its contract with the Car Corporation Respondent was able to realize a profit on the use of the leased tank cars. The intimation of *amicus curiae* that Respondent may have realized profits on cars covered by other leases or at periods different from that covered by the present action is, of course, pure assumption; and the statement that other shippers using cars also leased from the Car Corporation may have been less fortunate would seem entirely unwarranted in the light of the admitted fact in the record that the Car Corporation's tank cars were open to lease and in fact were leased by other manufacturers of coconut oil on the same terms. It is unnecessary for us to say that railroad tariffs were admittedly uniform, that is, the same for all shippers, and the mileage allowance paid by the carriers to the Car Corporation for the use of these particular cars was paid and payable under the published tariffs to all other car suppliers.

On the assumption that because Respondent seeks recovery of a substantial amount in this case the whole of that amount may be considered profit, counsel for the Commission state that this indicates that the terms of the Car Corporation's lease to Respondent were too liberal. This we believe is not a matter that concerns the Commission. The administrative authority of the Commission under the Interstate Commerce Act does not extend to non-transportation activities of the car manufacturing company. It has no authority to pass judgment upon the price at which car manufacturers may sell their cars or lease them. Because it is not engaged in transportation, the Car Corporation is

not required to file with the Commission or publish its charges. Until the private car is used by a carrier or becomes an instrumentality in interstate transportation, the interest and administrative authority of the Commission does not exist, and when that interest does arise the control of the Commission is to be exercised through its authority over the interstate carrier, as was held by this Court in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 432.

Premised on the assumption that the Car Corporation might make other contracts for the lease of its cars for less liberal terms than those granted Respondent, counsel for the Commission argue that there would result such an inequality as was condemned by this Court in *United States* v. *Union Stock Yards*, 226 U. S. 286. This does not follow at all. The *Union Stock Yards* case was entirely different. There a company engaged with others in interstate transportation agreed to pay a packing company a bonus which was not provided for in the filed and published tariffs. This was held to be a preference within the prohibition of the Elkins Act. We may concede that a payment of such bonus by a carrier that was not provided for in the published tariffs would be a violation of the Interstate Commerce Act and that such a payment to one shipper, and not to all, would constitute a discrimination within the prohibitions of the Elkins Act. But counsel for the Commission may not properly assume, without the warrant of any evidence, that the Car Corporation made less favorable leases to others than it did to Respondent and from that deduce that this case would come within the rule announced in *United States* v. *Union Stock Yards*.

At page 29 of the Commission's brief *amicus curiae* cite cases holding, it is claimed, that a shipper who has no capital investment in cars but obtains them through leases secures transportation at less than the tariff rates in violation of the statute. It is of no present importance whether the holding of the Commission *In the Use of Privately Owned Refrigerator Cars* is supported by the authority cited be-

cause, as we have shown, the action of the Commission in the refrigerator car matter has no bearing upon the present case, but the cases which counsel have cited do not sustain their point. We have already referred to the *Union Stock Yards* case. *Chicago & Alton R. R.* v. *Kirby* held invalid a contract whereby a railroad carrier agreed to move a shipper's cars by a particular train, thereby granting a preference over other shippers. *Davis* v. *Cornwell*, another of the cited cases, held illegal a contract by a railroad carrier for the furnishing of special cars. In each of the other cases cited there was some such element of preference or discrimination on the part of a carrier that was subject to criticism under the Interstate Commerce Act.

The whole argument of counsel for the Commission in respect of profits accruing to Respondent under its car lease is speculative and is based upon what might be termed probable or assumed profits, and upon the theory that the El Dorado Company might, if the Car Corporation shall make the payments as provided in the car lease agreement, secure transportation of its coconut oil at less than the published rates. No one will deny the authority of the Commission to investigate and act in such event, but because of that assumed possibility counsel for the Commission are not permitted to ignore the facts shown by the record in this case.

Respondent's coconut oil was sold on the basis of a contract price f. o. b. cars Berkeley. The consignees, not the shipper, paid the full freight provided to be so paid under the applicable tariffs. The Car Corporation, which had nothing to do with the routing of the cars or the shipment of the oil, collected from the carriers and still retains the exact mileage provided in the published tariffs to be paid, to the amount and for the period covered by the present action. As to the sum involved in this action, therefore, there is no foundation for the claim, on any theory whatsoever, that Respondent Oil Company has secured transportation or could, if the payment were made, secure transportation at

a rate less than that provided in the published tariffs. The Car Corporation properly has made no such claim and there is no justification for it on the part of counsel for the Commission.

Counsel for the Commission differ with the Court of Appeals as to the effect of certain provisions of the car lease agreement. The matters of difference are wholly immaterial. The Court's comments occur in its discussion of the Oil Company's expenses incident to the handling of the leased cars. That question was not an issue in the case and was only referred to by the Circuit Court in response to arguments advanced by the appellee before that Court. But, without disrespect to *amicus curiae*, we may be permitted to say that what the parties understood by their contract may well be left to them and their understanding was adequately shown by what they did under the contract.

The Car Corporation has not claimed a failure or want of consideration or any illegality or insufficiency in the car lease contract. On the other hand, in defending against Respondent's action for money claimed to be due to it in the District Court, the Car Corporation pleaded the contract.

Referring to a statement in the opinion of the Circuit Court of Appeals that the El Dorado Company was obligated under its lease for the tank cars to take possession thereof and provide trackage facilities, *amicus curiae* urge that there is no evidence upon this subject and that generally shippers using private side tracks or intra-plant tracks in preference to carriers' team tracks are usually required to pay for them. The statement of the Circuit Court was made in the course of its discussion of the question of the Oil Company's expense, which was not an issue in the case. The car lease agreement did, however, require the oil company to maintain its possession of such cars and to save the Car Corporation, as the lessor, against all liabilities for injury to the cars, or to persons or property while said cars are on the privately owned trackage

of the Oil Company. Therefore, the statement of the Circuit Court was warranted by the agreement itself. Whether or not Respondent would be required under the railroad tariffs to pay the railroads for demurrage or trackage charges is not an issue in the case and is not even pertinent to the claims advanced by counsel for the Commission.

Equally without application are the cases of *Warehouse Co.* v. *United States* and *United States* v. *American Tin Plate Corp.*, cited in the brief for the Commission. In the first named case this Court considered an attack upon an order of the Commission by certain warehouse companies who, under a published tariff, received from the Pennsylvania Railroad Co. compensation for consolidating express matter for railroad shipment. Other warehouses similarly situated objected to the preference and the Interstate Commerce Commission sustained them, on the ground that though the published tariffs provided for the allowance as required by the Interstate Commerce Act, the allowance was in itself a preferential discrimination and within the prohibitions of the Act. Similarly, in the cited case of *United States* v. *American Tin Plate Corp.*, the Commission had made its ruling with respect to allowances provided for in the published tariffs. We cannot see the relevancy of either of these cases. No action of the Commission was under attack in the lower courts or drawn in question by the Circuit Court of Appeals, nor is it claimed that any provision of the published tariffs works a discrimination or preference. Apparently counsel for *amicus curiae* cited those cases to warrant the interest of the Commission in the present action. The Respondent does not question the rule that if a tariff does work a rebate, a discrimination or a concession within the prohibitions of the Interstate Commerce Act, it may be set aside on the application of the Commission regardless of the length of time it has been in effect. As we have heretofore stated, the Commission has an un-

deniable right to act in such contingencies. But we believe it has no authority, administrative or otherwise, over the parties litigant in this action or any interest in the controversy.

At page 40 of the brief for the Commission reference is made to the Commission's report *In Refrigerator Car Mileage Allowances*, decided April 27, 1939. This matter was decided after the decision in the Circuit Court of Appeals. Its relevancy to the present action is not apparent. As reviewed in the Commission's brief it discloses that the Commission claims that it has no jurisdiction over agreements for car allowances as between a carrier and a car-owning company, not a shipper. In other words, it is held that a carrier is not required under the language of the Interstate Commerce Act to publish in its tariffs the fact that it is paying, or the amount it is paying, to car companies for the rental or use of cars where such car companies are not shippers, or shipper-owned or controlled. Whether the action of the Commission in that matter modified or obviated the order *In the Use of Privately Owned Refrigerator Cars, supra*, which order specifically refers to such contracts between the carrier and car companies, is a question of no moment in this case. As has been stated, tank car uses and allowances were expressly exempted from the order in the former refrigerator car proceeding.

The argument advanced by *amicus curiae* that because the Commission is without jurisdiction in the circumstances disclosed *In Refrigerator Car Mileage Allowances, supra*, payment by a car corporation of a portion of the mileage to a shipper accomplishes a rebate prohibited by the Elkins Act is both unsound and superficial. As we have heretofore shown, the facts of the instant case disclose that there was no rebate or discrimination as to any of the shipments in respect to which the allowances involved in this action were paid. In the brief heretofore filed by Respondent in answer to the brief of Petitioner, we have, we believe, sufficiently shown that on the issues and the evidence before

the Court the judgment of the Circuit Court of Appeals should be affirmed.

In concluding this brief in reply to that submitted by the Interstate Commerce Commission as *amicus curiae*, we submit that the District Court had adequate and complete jurisdiction to hear and determine this case on the pleadings. Every element to make up the jurisdiction under the Judicial Code was present and the Court having taken jurisdiction could not be divested of it by any subsequent event. *Amicus curiae* claim that an administrative question within the primary jurisdiction of the Interstate Commerce Commission was involved and therefore the District Court lost its jurisdiction. The defense plea by the Car Corporation that notwithstanding its agreement it should not be required to pay the money as claimed by Respondent because such payment was expressly prohibited by the Elkins Act, did not raise an issue or present a question within the administrative jurisdiction of the Interstate Commerce Commission. There was no question of rates or regulation. The answer raised a single question of law as to the meaning of the Elkins Act. That was not a question within the administrative or the primary jurisdiction of the Interstate Commerce Commission. It was a question purely within the jurisdiction of the Court. Therefore, the contention of counsel for the Commission that the action should be dismissed must be denied.

The brief filed in behalf of the Interstate Commerce Commission does not disclose that it has any real interest in the controversy. The case does not involve the making, the interpretation or the enforcement of a tariff, or any other question within the administrative or primary control of the Commission. The litigating parties recognize and claim to be abiding by the published tariffs. The carriers are in no manner interested. The only question is as to whether the prohibition of the Elkins Act in the facts of this case can be availed of by the Car Corporation to avoid payment by it according to the terms of its car lease

agreement of the amounts which it has received under the tariffs and still retains. The Circuit Court of Appeals held that the prohibitions of the Elkins Act were not applicable to this case and that Respondent was entitled to judgment. We submit that decision should be affirmed. Such affirmance would have no effect upon the authority of the Interstate Commerce Commission to take such action as it might desire in the way of investigation and corrective orders if it has any question as to the propriety of the existing tariffs and if it should conclude that it has jurisdiction over the commercial dealings, wholly distinct from transportation, of a car owner and a car lessee.

Respectfully submitted,

W. F. WILLIAMSON,
W. R. WALLACE, JR.,
RICHARD P. NORTON,
WILLIAMSON & WALLACE,
310 Sansome Street,
San Francisco, California,
Attorneys for Respondent.